

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUNE -2 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

MANUEL SANCHEZ,

Appellant.

)
)
) 2 CA-CR 2008-0302
) DEPARTMENT A
)

) MEMORANDUM DECISION

) Not for Publication

) Rule 111, Rules of
) the Supreme Court
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074435

Honorable Richard S. Fields, Judge
Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann

Tucson
Attorneys for Appellee

Wanda K. Day

Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Following a jury trial, Manuel Sanchez was convicted of transporting more than two pounds of marijuana for sale. The trial court sentenced him to a mitigated term of

seven years' imprisonment. On appeal, he challenges the court's denial of his motion to suppress evidence discovered as a result of a vehicle stop he claims was not based on reasonable suspicion. We affirm.

¶2 “We review the court's ruling for an abuse of discretion, considering only the evidence presented at the suppression hearing and viewing that evidence in the light most favorable to sustaining the trial court's ruling. We review de novo the court's legal conclusions,” including the court's determination that reasonable suspicion existed. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 3, 185 P.3d 135, 137 (App. 2008) (citation omitted); *see also State v. Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d 266, 271 (App. 2007).

¶3 On a Saturday morning at approximately 7:30, United States Border Patrol Agent Sean Daly was traveling westbound on Arivaca Road when he noticed an unusual reaction to his presence from the occupants of a Ford Explorer traveling in the opposite direction. He explained that ninety percent of those people traveling eastbound on Arivaca Road at that time of day, especially on a Saturday, are Arivaca or Amado residents who “see Border Patrol day in and day out” and merely glance at a Border Patrol vehicle, if they acknowledge it at all. Sanchez and his passenger, however, looked at Daly like “deer in the headlights.” Daly also testified that Arivaca Road is “used excessively by both illegal aliens and illegal contraband smugglers” because it allows them to bypass a Border Patrol checkpoint on Interstate 19 and that smugglers had been “hitting” the area at the Border Patrol's shift changes, one of which was at 8:00 a.m. Daly was “working an overtime day . . . doing an operation called Operation Arivaca Denial” that had been “specifically designed to cover the shift change.”

¶4 Daly made a U-turn and followed the Explorer. He testified Sanchez and his passenger had watched him “intently” through the vehicle’s mirrors “to the point that they weren’t paying attention to the road. They crossed the yellow line. They crossed the center line, the outside line, speeding up and slowing down.” This behavior continued for “about two-and-a-half miles until [he] stopped them.”¹ Before stopping the vehicle, Daly checked the vehicle’s registration and learned it was registered to a Tucson address, which Daly found “significant” because smugglers “common[ly] . . . use vehicles not registered to the area.” He also explained that it is “extremely uncommon” and “very rare” for a vehicle registered in Tucson to be traveling eastbound on Arivaca Road on a Saturday morning, away from, rather than toward, the local tourist attractions and the towns of Ruby and Amado. The trial court found, based on the totality of these circumstances, that Daly had reasonably suspected Sanchez of criminal activity and denied Sanchez’s motion to suppress.

¶5 “[B]ecause Fourth Amendment protection is fully applicable to an investigatory stop, the ‘totality of the circumstances’” surrounding that stop “must provide ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996), *quoting United States*

¹To the extent Daly’s testimony suggests he had observed Sanchez violate a traffic law or laws, the state has not argued, nor did the trial court find, that such violation had provided a basis for the stop. *See Whren v. United States*, 517 U.S. 806 (1996) (stop based on observed traffic violations as pretext for investigation of unrelated criminal activity not unreasonable under Fourth Amendment); *see also State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118-19, 927 P.2d 776, 778-79 (1996) (distinguishing *Whren* based on lack of any observed traffic violation in determining border patrol agent had lacked reasonable suspicion to stop defendant). Moreover, Daly testified he had not stopped Sanchez “as a result of a traffic violation.”

v. Cortez, 449 U.S. 411, 417-18 (1981); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (“Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”). In determining the existence of reasonable suspicion, “[o]fficers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic.” *Brignoni-Ponce*, 422 U.S. at 884-85. “They also may consider information about recent illegal border crossings in the area” and a driver’s behavior, including any “erratic driving.” *Id.* at 885. An officer is also “entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area’s inhabitants.” *United States v. Arvizu*, 534 U.S. 266, 276 (2002); *see also State v. Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d 954, 956 (App. 2008) (“Our assessment of reasonable suspicion is based on the totality of the circumstances, considering such objective factors as the suspect’s conduct and appearance, location, and surrounding circumstances, such as the time of day, and taking into account the officer’s relevant experience, training, and knowledge.”).

¶6 “While ‘reasonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop.” *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). “The officer must be able to articulate more than an ‘inchoate and unparticularized suspicion or “hunch”’ of criminal activity.” *Id.*

at 123-24, *quoting Terry v. Ohio*, 392 U.S. 1, 27 (1968). Daly did so here. His suspicion of Sanchez was reasonably based on his knowledge of the area, its residents, and the local traffic patterns, coupled with Sanchez’s reaction to, and apparently sustained preoccupation with, Daly’s presence. Considering the confluence of all of these circumstances, the trial court did not err by denying Sanchez’s motion to suppress evidence based on a lack of reasonable suspicion.

¶7 The cases upon which Sanchez relies are inapposite. In *United States v. Jimenez-Medina*, 173 F.3d 752, 753-54 (9th Cir. 1999), a border patrol agent stopped the defendant’s pickup truck on Interstate 10, approximately 130 miles from the Mexican border. The court found the stop unreasonable primarily because it determined the “linchpin of the government’s argument”—the inference that the truck had had “‘recent border access’”—was unsupported by the facts of the case. It also found that although the truck had Arizona license plates, it was registered to a Mexican resident of a town that had experienced a recent increase in alien smuggling. *Id.* at 754-55. Moreover, although the agent had testified “open-bed pickups are often used to smuggle aliens across the border,” the agent had known “in fact from physical observation . . . that there were no persons in the back of the [defendant’s] pickup.” *Id.* at 754.

¶8 Further, although the court cited *United States v. Robert L.*, 874 F.2d 701, 703 (9th Cir. 1989), for the proposition that “a driver’s preoccupation with a police vehicle following him is a ‘quite natural reaction’ . . . insufficient to justify an investigatory stop,” *Jimenez-Medina*, 173 F.3d at 755, the court in *Robert L.* actually acknowledged its holding “in numerous cases that the manner in which a suspect looks at or avoids looking at an

officer can be a factor in assessing whether criminal activity is afoot.” *Robert L.*, 874 F.2d at 703. The court in *Jimenez-Medina* was not swayed by the agent’s “belief” that the driver in that case had been “preoccupied with the agent’s presence” when, although the agent could not see the driver, the “pickup weav[ed] within its lane.” 173 F.3d at 754. Here, Daly testified he could see both Sanchez and his passenger looking intently at him through the rearview mirrors.

¶9 In *United States v. Garcia-Camacho*, 53 F.3d 244, 245 (9th Cir. 1995),² border patrol agents had been “unloading . . . undocumented aliens from a van” on the side of a highway when one of them observed the defendants’ truck drive by at a speed “a little faster than the flow of traffic”; the driver had “stared straight ahead” as he passed, but the passenger turned around and looked at the agent with an expression of ““surprise.”” “Based on these observations, and his belief that Interstate 5 was ‘the fastest route to economic opportunities,’ [the agent] became suspicious that illegal aliens were being transported in the truck bed.”³ *Id.* In determining no reasonable suspicion existed to support stopping the vehicle, the court gave little or no weight to the agent’s observation of the passenger’s expression. *Id.* at 247-48. It noted that the agent had only observed the “passenger’s face in a truck that [had been] moving away . . . at a high rate of speed” and that the agent’s testimony about the expression had been inconsistent. *Id.* at 247. He had described it as one

²Sanchez uses Garcia-Camacho’s codefendant, Gutierrez-Rosales, in his title citation to this case.

³Before stopping the vehicle, the agent also observed it was “heavily laden and was reacting to bumps similarly to [a] van that he had just stopped.” *Id.* at 245.

of “surprise” and of “terror” and stated it was “the kind of look that ‘illegal aliens get when they are about to run’” but also could have been consistent with “the look that some people have if they think they are driving over the speed limit.” *Id.* at 245, 247-48. The present case is factually distinguishable. Daly observed Sanchez and his passenger as he was driving toward and passed them. He consistently described Sanchez and his passenger’s expressions and, unlike the agent in *Garcia-Camacho*, he articulated objective grounds for his conclusion that they had reacted unusually to his presence. *See id.* at 247 (agent’s “impressions . . . entirely subjective”).

¶10 As discussed above, the totality of the circumstances in this case supported the trial court’s determination that Daly had reasonably suspected Sanchez of criminal activity before stopping the vehicle. Therefore, his conviction and sentence are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge